

Judicial Predictability in United States Supreme Court Advocacy: An Analysis of the Oral Argument in *Tennessee Valley Authority v. Hill*

by Donald S. Cohen*

INTRODUCTION

By the time this article appears in print, commentary on the United States Supreme Court's decision in the case of *Tennessee Valley Authority v. Hill*,¹ which pitted the snail darter, a three-inch member of the perch family, against T.V.A.'s Tellico Dam, will undoubtedly have been published or have gone to press. Few recent cases have attracted the degree of national publicity this controversy has, and more than one environmental law scholar will assuredly fully examine the ethical and practical ramifications of the Court's decision affirming the Sixth Circuit's determination that closure of the dam should be enjoined.

Because of the author's personal involvement in the case as co-plaintiff-respondent and co-counsel,² however, it became apparent that further insight might be gleaned from the decision than that provided by more traditional law review discussion. Although the Supreme Court's decision is, of course, unmistakably significant in its holding³ that, despite T.V.A.'s expenditure of millions of dollars on the Tellico Project prior to the effective date of the Endangered Species Act⁴ and the listing of the fish as "endangered," the Act prevents completion of the project because impoundment of the river would jeopardize the existence of the snail darter and modify or destroy its habitat,⁵ the author found equally fascinating the apparent roles the various Justices seemed to play during oral argument of the case and the predictive value of the questions posed and comments made by the

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1. 98 S. Ct. 2279 (1978).

2. At the time the lawsuit was initially filed, the author was a member of the faculty of the University of Tennessee College of Law. Other plaintiffs were Zygmunt J.B. Plater, then also on the Tennessee faculty and now a professor at Wayne State University Law School, and Hiram G. Hill, then a University of Tennessee law student and now in legal practice in Tennessee. The Tennessee Audubon Council and the Association of Southeastern Biologists were added as plaintiffs prior to trial.

3. 98 S. Ct. 2279, 2301-02 (1978).

4. 16 U.S.C. §§ 1531-1543 (1976) (effective date, December 28, 1973).

5. See generally 16 U.S.C. § 1536 (1976).

members of the Court.

This article will, therefore, analyze the transcript of oral argument in *T.V.A. v. Hill* and compare and contrast the apparent predispositions of the Justices as evidenced by their inquiries and remarks at the Supreme Court hearing with the positions ultimately taken by them.⁶ In this connection, the article will evaluate the hypothesis that several of the Justices assumed specific roles during the argument based upon their predispositions concerning the substantive issues involved. Last, some general observations concerning predictability of Supreme Court decisions based upon oral argument interchange will be made. Hopefully, they will prove to be interesting to students of the Court and perhaps useful to students of appellate advocacy in general.

BACKGROUND

Before a meaningful examination of the Supreme Court hearing can be made, a brief discussion⁷ of the case's factual and procedural background is necessary. T.V.A. first proposed a dam on the Little Tennessee River near its junction with the Tennessee River, the present site of Tellico Dam, in 1936. Congress initially appropriated funds for the project in 1966, and construction began in 1967. In the early 1970's, federal litigation⁸ concerning the adequacy of T.V.A.'s environmental impact statement required by the National Environmental Policy Act⁹ delayed construction for twenty months, after which the district court found that the final environmental impact statement complied with the law.¹⁰ The dam, which would impound the last remaining thirty-three miles of free-flowing river in the Tennessee River system¹¹ and thereby destroy a number of archeological sites of great historical significance¹² and cover some 16,500 acres—much of which

6. Chief Justice Burger delivered the opinion of the Court, in which Justices Brennan, Stewart, White, Marshall, and Stevens joined. Justice Powell filed a dissenting opinion, in which Justice Blackmun joined. Justice Rehnquist filed a separate dissenting opinion.

7. For a more complete statement of the factual background of the Tellico Dam controversy, see 98 S. Ct. 2279, 2283-90 (1978).

8. *Environmental Defense Fund v. T.V.A.*, 339 F. Supp. 806 (E.D. Tenn.), *aff'd*, 468 F.2d 1164 (6th Cir. 1972).

9. 42 U.S.C. §§ 4321-4347 (1970).

10. *Environmental Defense Fund v. T.V.A.*, 371 F. Supp. 1004 (E.D. Tenn. 1973), *aff'd*, 492 F.2d 466 (6th Cir. 1974).

11. There are 68 dams throughout the Tennessee Valley, 22 of which are within 60 miles of Tellico Dam. Brief for Respondents at 4, *T.V.A. v. Hill*, 98 S. Ct. 2279 (1978).

12. These historical sites include Fort Loudon, established in 1756 as England's Southeastern outpost in the French and Indian War, and the ancient Cherokee towns of Echota, the capital of the Cherokee nation as early as the 16th century, and Tennesse, the location providing the linguistic basis for the name of the State of Tennessee.

is productive farmland—with water, was justified in terms of flood control, navigation, electrical power,¹³ industrial development,¹⁴ and recreation. A recent study by the General Accounting Office,¹⁵ however, has cast suspicion on the alleged benefits of the project, and a T.V.A.-U.S. Department of Interior Report¹⁶ prepared in August of 1978 indicates that many of the stated benefits can be achieved without closing the dam's gates and thereby bringing about the snail darter's extinction.

In August, 1973, a University of Tennessee ichthyologist discovered in the portion of the Little Tennessee River to be impounded by the dam a species of fish he did not believe had previously been scientifically identified. Further investigation led him to the conclusion that the fish, the "snail darter,"¹⁷ requires a shallow, fast-flowing, clear, riverine environment with a clean gravel bottom to live and reproduce, and that the creation of Tellico Reservoir as a deep, silted, nonflowing lake, would destroy the fish's habitat and render it extinct within a few years. Four months after the discovery, the Endangered Species Act of 1973 became effective. Section 7 of the Act states that federal agencies, in consultation with the Secretary of Interior, shall utilize their authorities by carrying out programs to conserve species listed as endangered and threatened under the Act and

by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary [of Interior] . . . to be critical.¹⁸

In January of 1975, two of the plaintiffs petitioned the Secretary of Interior to list the fish as endangered. After ten months of administrative proceedings, the Secretary determined the snail

13. Tellico Dam itself contains no electrical generators, but an interreservoir canal connecting Tellico Reservoir with Fort Loudon Dam, one mile downstream on the Tennessee River, would augment the latter's generating capacity.

14. The Boeing Aerospace Company withdrew as developer of the proposed model town, Timberlake, in March, 1975. TENNESSEE VALLEY AUTHORITY AND U.S. DEP'T OF INTERIOR, ALTERNATIVES FOR COMPLETING THE TELLICO PROJECT 8 (draft report, August 10, 1978).

15. COMPTROLLER-GENERAL OF THE UNITED STATES, GENERAL ACCOUNTING OFFICE REPORT No. EMD - 77-58 (October 14, 1977).

16. TENNESSEE VALLEY AUTHORITY AND U.S. DEP'T OF INTERIOR, ALTERNATIVES FOR COMPLETING THE TELLICO PROJECT (draft report, August 10, 1978).

17. The snail darter, later given the scientific name of *Percina Imostoma tanasi*, is a member of the perch family, and feeds in large part upon fresh water snails.

18. 16 U.S.C. § 1536 (1976).

darter lives only in that portion of the river that would be inundated, and closing the dam would result in the destruction of the fish and its habitat. The formal listing of the snail darter as an endangered species¹⁹ became effective on November 10, 1975. During this period and at several subsequent times, T.V.A. informed a subcommittee of the House Committee on Appropriations²⁰ of the controversy concerning the snail darter; the House Committee, nevertheless, recommended that additional funds be appropriated for the completion of the project.

Consultation between the Department of Interior and T.V.A. proved fruitless, and in February of 1976, the plaintiffs filed a lawsuit in the United States District Court for the Eastern District of Tennessee seeking a temporary and permanent injunction prohibiting the closing of the dam. The district court denied plaintiffs' request for a preliminary injunction and set the matter for trial, which was held in late April, 1976. The snail darter's habitat in the Little Tennessee River had been determined to be "critical" pursuant to Section 7 of the Act in early April, 1976.²¹ On May 25, 1976, the district court entered its opinion denying the plaintiffs' requested relief and dismissing the complaint.²² The court took this position in spite of its findings that closure of the dam and subsequent impoundment of the river would adversely modify, if not completely destroy, the snail darter's critical habitat, making it highly probable the fish's continued existence would be jeopardized.²³ The district court based its decision on its inherent equitable power to consider such factors as the project's percentage of completion, the \$53 million the court found would be irretrievably lost if the project were not completed, and T.V.A. testimony that other than scrapping the entire project, no viable alternatives to closure of the dam existed that would preserve the snail darter.²⁴

In January of 1977, the Court of Appeals for the Sixth Circuit²⁵ agreed with plaintiffs' argument that the trial court had abused its discretion by not issuing an injunction in the face of a clear federal statutory violation. The court reversed the lower court decision and remanded the case with instructions that a

19. 40 Fed. Reg. 47,505 (1975).

20. The Endangered Species Act originally was the responsibility of the House Committee on Merchant Marine and Fisheries, not the Appropriations Committee.

21. 41 Fed. Reg. 13,926 (1976).

22. *Hill v. T.V.A.*, 419 F. Supp. 753 (E.D. Tenn. 1976).

23. *Id.* at 757.

24. *But see* text accompanying note 16 *supra*.

25. *Hill v. T.V.A.*, 549 F.2d 1064 (6th Cir. 1977).

permanent injunction issue halting all Tellico Project activities that may destroy or modify the snail darter's critical habitat.²⁶ The injunction was to remain in effect until Congress specifically exempts the project from the operation of the Endangered Species Act or the Secretary of Interior removes the fish from endangered status.

On April 18, 1978, the United States Supreme Court heard oral argument on the case, and on June 15, 1978, the Court affirmed the Sixth Circuit's decision, thus leaving the permanent injunction in effect.²⁷ Chief Justice Burger, writing for the majority, noted the clear findings of the trial court, undisputed on appeal, that the snail darter's existence would be jeopardized and its habitat modified or destroyed by the project's completion.²⁸ He observed that the language of section 7 makes no exception for projects underway on the date of the Act's passage,²⁹ and further noted that congressional appropriations could not, by implication, be permitted to repeal the clear application of the Act to the Tellico Project.³⁰ Last, he indicated that, despite the inherent power of a chancellor to balance the equities involved, to permit the trial judge to do so in these circumstances would undermine the nation's commitment to the doctrine of separation of powers.³¹ That is, it is for the legislative, not the judicial, branch to determine whether, despite a violation of federal law, public policy, through a weighing of benefits and costs, demands the Tellico Project be completed. Justices Brennan, Stewart, White, Marshall, and Stevens joined the Chief Justice in his opinion. Justice Powell, joined by Justice Blackmun, dissented,³² arguing that Congress could not have intended section 7 of the Act to prohibit the operation of a substantially completed federal project, particularly where a long history of congressional awareness of the controversy with continued appropriations was in evidence. Justice Rehnquist filed a separate dissent³³ in which he concluded the Act did not prohibit the district court from refusing, in the exercise of its traditional equitable powers, to enjoin closure of the dam.

26. *Id.* at 1075.

27. *T.V.A. v. Hill*, 98 S. Ct. 2279 (1978).

28. *Id.* at 2290.

29. *Id.* at 2291-98.

30. *Id.* at 2299-301.

31. *Id.* at 2301-02.

32. *Id.* at 2302-10.

33. *Id.* at 2310-11.

ANALYSIS OF ORAL ARGUMENT

With this background in mind, an examination of the Supreme Court oral argument can proceed. Justices Stevens and Stewart will be discussed first.

At a very early point in the argument, it becomes obvious Justice Stevens plays a quite specific role in support of the plaintiffs' position. For example, after a brief factual opening statement, Attorney General Griffin Bell, who argued on behalf of the Tennessee Valley Authority, holds up for the Court's observation a plastic vial containing a fish.

ATTORNEY GENERAL BELL: I have in my hand a darter, a snail darter. It was Exhibit No. 7 in the case when it was filed. And we brought that with us so you could see it. It's three inches. It is supposed to be a full grown snail darter, about three inches in length.

JUSTICE BRENNAN: Is it alive?

ATTORNEY GENERAL BELL: I've been wondering what it's in if it is.

[Laughter.]

ATTORNEY GENERAL BELL: It seems to move around. I've been puzzled over that.

JUSTICE STEVENS: Mr. Attorney General, your exhibit makes me wonder. Does the Government take the position that some endangered species are entitled to more protection than others?

ATTORNEY GENERAL BELL: Well, I don't take it this morning, because I don't have to. I don't have to reach that point.

JUSTICE STEVENS: Your argument would apply to every endangered species, American Eagle, no matter what it might be. Is that right?

ATTORNEY GENERAL BELL: I say that's what the Sixth Circuit held. I wouldn't say that.

JUSTICE STEVENS: The statute, the Endangered Species Act, doesn't distinguish as among various priorities in the different species, does it?

ATTORNEY GENERAL BELL: It does not. It looks to the list. Once it gets on the list, it is an endangered species. And then this case goes much further, because its critical habitat is the thing.

JUSTICE STEVENS: And the snail darter is on the list; there's no question about it.

ATTORNEY GENERAL BELL: It's on the list, and this particular area has been designated as a—

JUSTICE STEVENS: Critical habitat.

ATTORNEY GENERAL BELL: —critical habitat.

JUSTICE STEVENS: Right.³⁴

Thus, Justice Stevens, apparently perceiving the Attorney General's attempt at frivolity as a threat to meaningful resolution of the significant issues presented, immediately assumed the role of redirecting discussion to the precise language of the statute and its application to the facts presented.

Not only is Justice Stevens's role apparent in his response to efforts to make light of the snail darter, he persists in the role throughout the hearing, particularly in reply to arguments that attempt to undermine his predisposition in favor of plaintiffs' position. Thus, approximately halfway through Attorney General Bell's argument, after the Chief Justice notes the controversy has been called to the attention of Congress, the following interchange takes place.

ATTORNEY GENERAL BELL: It has been; everytime they said, go forward.

Now that would be the last argument that I would argue if I needed to argue it.

JUSTICE STEVENS: Did Congress ever grant an exemption from the Endangered Species Act for the snail darter?

ATTORNEY GENERAL BELL: They have not.

JUSTICE STEVENS: And they were very much aware of this problem, weren't they?

ATTORNEY GENERAL BELL: They are aware of it and—

JUSTICE STEVENS: Might it have been the most unambiguous way to resolve the whole thing?

ATTORNEY GENERAL BELL: That would be it, and that's my last point.

JUSTICE STEVENS: Much better than just hiding it in a committee report in an appropriations bill.

ATTORNEY GENERAL BELL: Well, the last—in '77 they put it on the face of the statute, \$2 million to move—

JUSTICE STEVENS: \$2 million; so they thought the snail darter was worth \$2 million, but not \$130 million.

ATTORNEY GENERAL BELL: I would say that would be a fair inference.³⁵

Justice Stevens's position is, by this time, quite apparent. He continues to challenge the Attorney General with such questions as:

JUSTICE STEVENS: Mr. Attorney General, can I ask one question about your argument about why the statute doesn't apply?

Are you saying that the statute merely requires

35. *Id.* at 20.

consultation? Or are you saying that completing the dam would not be an action within the meaning of the statute?³⁶

Bell admits closure would be an "action" but argues that an injunction is nevertheless inappropriate. Then, a short time later, in response to a question from Justice Stewart concerning pending legislation that would amend section 7 of the Act, Attorney General Bell responds that there is legislation at the committee level that would specifically exempt the Tellico Project from compliance with the Act.³⁷ Justice Stevens immediately propounds plaintiffs' theory by observing:

JUSTICE STEVENS: Of course that would still be possible, Mr. Attorney General, if we were to sustain the injunction. Congress could always exclude the snail darter later. But if we let the snail darter be extinguished, I guess the choice is irrevocable.

ATTORNEY GENERAL BELL: Well, if you did that—but I don't know of anybody that's trying to extinguish the snail darter.³⁸

Justice Stevens continues his probe of Bell's argument:

JUSTICE STEVENS: Well, the Secretary has found that he will be so extinguished if the dam is closed.

36. *Id.* at 21.

37. Although the House of Representatives eventually passed legislation specifically exempting the Tellico Project from Section 7's mandate, H.R. 14104, 95th Cong., 2d Sess. (October 14, 1978), the Senate earlier refused to do so and instead passed a bill that would have established a cabinet level committee to hear exemption requests. S. 2889, 95th Cong., 2d Sess., CONG. REC. 511, 158 (daily ed. July 19, 1978).

In conference on the final day of the congressional session, both houses finally passed a compromise bill generally adopting the Senate format. That legislation establishes a committee composed of the Secretaries of Agriculture, Army, and Interior, the Chairman of the Council of Economic Advisers (a change from the earlier Senate bill, which included the Chairman of the Council of Environmental Quality instead), the Administrators of the Environmental Protection Agency and the National Oceanic and Atmospheric Administration, and a presidential appointee recommended by the governor of the state affected by the listing of a species as endangered or threatened. A lower level, three-member board composed of a Secretary of Interior appointee, a presidential appointee suggested by the governor of the affected state, and an administrative law judge selected by the Civil Service Commission, would hear exemption requests and make recommendations to the cabinet level group.

Exemptions will be granted only if the committee determines that no reasonable and prudent alternative to the agency action exists, the action is of national or regional significance, and the benefits of the agency action to the public outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat. The legislation further provides that, within ninety days of the bill's enactment, the committee must determine that the Tellico Project is not exempt from the operation of Section 7 or the Project will be automatically exempted. S. 2889, 95th Cong., 2d Sess. (October 15, 1978). At the time of printing, the *Congressional Record* of the final legislation was not yet available. Information concerning the bill is from *Congress Clears Legislation Allowing Some Exemptions to Endangered Species Act*, 36 CONG. Q. 3045-46 (weekly ed. October 21, 1978) (Editor's note: On January 23, 1979, the committee unanimously decided the project should not be exempted.)

38. Record at 24.

ATTORNEY GENERAL BELL: Well, but—

JUSTICE STEVENS: But don't we have to assume that's the fact for the purposes of the decision?

ATTORNEY GENERAL BELL: No, no, the record shows clearly that the snail darter has been transplanted to the Hiwassee River.

JUSTICE STEVENS: Oh, therefore, it is not the critical habitat? Is that right?

I mean, what assumption do we make for the purpose of deciding? Is the snail darter going to be extinguished or not?

ATTORNEY GENERAL BELL: We can't find that. Only the Secretary under the law can find that.

JUSTICE STEVENS: And he has found it will be, hasn't he?

ATTORNEY GENERAL BELL: That's what he found at one time.

JUSTICE STEVENS: But don't we have to assume that when we decide the case?³⁹

Bell finally responds that he disagrees. To apply the Secretary's finding to a virtually completed project, he reasons, would violate the presumption against retroactivity.⁴⁰ Later in Bell's presentation, Justice Stevens again presses the argument that the Court may not second-guess the Secretary of Interior's biological findings. Bell discloses his displeasure that the Department of Interior has taken a position contrary to the Department of Justice-T.V.A. view,⁴¹ and he remarks that the government should speak through only one voice, the Attorney General of the United States.⁴² Justice Stevens explodes:

JUSTICE STEVENS: But Mr. Attorney General, are you suggesting that if the Secretary of the Interior has placed a species on the endangered species list, that the Attorney General should have the power to take it off the list.

ATTORNEY GENERAL BELL: No, no; I'm not suggesting that.

JUSTICE STEVENS: No matter what we do, that part of the record is before us. The Secretary of the Interior has determined that this is an endangered species. And we have to accept that.

ATTORNEY GENERAL BELL: And that this is a critical habitat.

JUSTICE STEVENS: Yes.

ATTORNEY GENERAL BELL: And that's his prerogative. I'm not denying that.

JUSTICE STEVENS: We can't second guess him on that, can we?

39. *Id.* at 24-25.

40. *Id.* at 25.

41. The appendix to the T.V.A. brief was, in fact, a brief supporting plaintiffs' position, entitled "Views of the Secretary of the Interior." Brief for Petitioner at 1a-13a, *T.V.A. v. Hill*, 98 S. Ct. 2279 (1978).

42. Record at 31.

ATTORNEY GENERAL BELL: No.

JUSTICE STEVENS: Any more than you can.⁴³

In contrast to his involvement in Attorney General Bell's presentation, Justice Stevens is remarkably inactive during plaintiff-respondents' argument, delivered by Zygmunt J.B. Plater, a Wayne State University law professor. The Justice's one major inquiry,⁴⁴ however, is readily predictable, since it reveals his belief that the statute is clear on its face, and an injunction, therefore, an appropriate remedy. Plater has noted that Congress and the T.V.A. are presently reviewing the project and considering which benefits can be achieved in the absence of a reservoir. Justice Marshall replies that the Court must limit its consideration to the record before it, alluding to his displeasure with earlier mention of current efforts to transplant the snail darter to the Hiwassee River, a tributary of the main Tennessee. Plater then attempts to utilize facts in the record to make his point concerning agency consideration of alternatives, but Justice Stevens interrupts.

JUSTICE STEVENS: Mr. Plater, let me interrupt you with just one question. Because there's been an awful lot of discussion about things that have happened since the District Court tried this case.

Is any of that relevant to our discussion? Anything the Attorney General said, or anything you've been telling us in response to all these questions? We have a finding of fact that this closing the dam would result in total destruction of the snail darter's habitat. Do we have to know anything else?

MR. PLATER: No, Your Honor. I agree completely with Your Honor's question.⁴⁵

43. *Id.* at 32.

44. The only other point at which Justice Stevens appears in the record of Plater's argument involves another attempt to bolster plaintiffs' cause. In the transcript, a question mark appears after Justice Stevens's name, so the court reporter was apparently uncertain as to the source of the question. Record at 59. The question does, however, seem typical of the role Justice Stevens had been playing throughout the argument. Justice Powell had been questioning Plater on the logical extension of plaintiffs' argument to the application of § 7 to a project already completed and operational, as the Grand Coulee Dam. Sensing that Plater was going to answer that § 7 unequivocally would apply, despite the fact that such an extreme position was not necessary to the resolution of the case in plaintiffs' favor, Justice Stevens (?) interrupts a series of heated questions by Justices Burger, Powell, and Rehnquist by noting his position affirmatively, thus affording Plater the opportunity to adopt a more moderate view.

JUSTICE STEVENS: There's nothing that would require you to tear a dam down. Record at 59. For a more complete discussion of this portion of the argument, see text accompanying note 59 *infra*, where Justice Powell's inquiries are more fully explored.

45. Record at 50.

Justice Stevens's position is, thus, quite apparent from a very early point in the hearing. Where a federal law has been violated, he believes an injunction is the appropriate remedy. Other considerations are irrelevant, and any attempt to distinguish among protected species will not be tolerated.⁴⁶ In large part, this is the position of the majority opinion, in which he joined. Justice Stevens's vote, therefore, came as no surprise.

So also, Justice Stewart's vote with the majority is predictable. The role he plays during the argument is quite similar to that played by Justice Stevens. For instance, two-thirds through his presentation, Attorney General Bell argues that to resolve a section 7 dispute, factors such as the virtually completed stage of construction, the transplantation efforts, and the fact that the Secretary of Interior does not have a veto in these matters, must be taken into account. He proposes as the test: "Has the T.V.A. consulted in good faith and done all it can do under these circumstances?"⁴⁷ Justice Stewart reveals his predisposition immediately.

JUSTICE STEWART: Well, the statute requires more than just consultation in good faith. It does require consultation, but then it requires, in rather clear and unambiguous words, the agency to take such action necessary to insure that actions authorized, funded, or carried out by it do not jeopardize the continued existence of the endangered species, or the destruction or modification of its critical habitat. "Action necessary to insure"

ATTORNEY GENERAL BELL: Well, if you—

JUSTICE STEWART: "—that their actions do not jeopardize the continued existence."

And as I understand it, it's conceded that the completion of this dam will jeopardize the continued existence of this endangered species, or the modification of its critical habitat.

ATTORNEY GENERAL BELL: We don't concede—we concede it will modify this critical habitat.

JUSTICE STEWART: Which has been found to be the critical habitat, as I understand it.

ATTORNEY GENERAL BELL: Well, unless this moving over to the Hiwassee River makes that into a noncritical habitat.

JUSTICE STEWART: But the Secretary has determined this to be the critical habitat, has he not?

ATTORNEY GENERAL BELL: At the time, yes.

46. An interesting inquiry would be to determine if Justice Stevens would extend his reasoning beyond the animal kingdom to endangered plant species, also protected under the Act. 16 U.S.C. § 1532(11) (1976).

47. Record at 21.

JUSTICE STEWART: And has determined this little fish to be an endangered species.

ATTORNEY GENERAL BELL: Right.

JUSTICE STEWART: It seems—the language of the statute that I just read aloud for my own information and to refresh your memory seems to me to be an unambiguous requirement.

ATTORNEY GENERAL BELL: Well, that's what the Sixth Circuit said.

JUSTICE STEWART: Yes, well, isn't that what the words say?

ATTORNEY GENERAL BELL: Not to me.

In the first place, I don't—I think you very often say, is a statute intended to be retroactive? There is a presumption against retroactive construction of a statute?

This is certainly retroactive. It is being—has been applied retroactively.⁴⁸

Like Justice Stevens, Justice Stewart adopts a strict interpretation of the statutory language and thus supports the imposition of a mandatory duty upon federal agencies to protect endangered species.

Justice Stewart's only other major remarks relate to Justice White's inquiry whether the Secretary of Interior's determination of endangered status for the snail darter is subject to judicial review.

ATTORNEY GENERAL BELL: Right, I know—I'm satisfied you can review it under the Administrative Procedure Act. But this, the case—

JUSTICE WHITE: By a suit in a District Court, or by—probably, I guess.

ATTORNEY GENERAL BELL: I think it would go to the District Court.

JUSTICE STEWART: But that's not a change; that's just a maintenance of the status quo.

ATTORNEY GENERAL BELL: Well, it's a denial of—

JUSTICE STEWART: It's a refusal of the Secretary to change the status quo.

ATTORNEY GENERAL BELL: Right.

JUSTICE STEWART: It's not a change.⁴⁹

Justice Stewart continues his probe of the reviewability of the Secretary's determination during Plater's argument,⁵⁰ and Plater responds that judicial review of the listing is possible under the Administrative Procedure Act. Justice Stewart's remarks reveal-

48. *Id.* at 22-23.

49. *Id.* at 28.

50. *Id.* at 36-37.

ing his strict construction of the Act's language, plus his apparent attempt to elicit the conclusion that trial court review of the fish's original listing would be an appropriate method to exempt the Tellico Project from the Act's mandate, should have made it quite clear that he would join in a majority opinion committed to the doctrine of separation of powers and hesitancy to alter the status quo. Like Justice Stevens, but to a somewhat lesser extent, Justice Stewart's role is that of plaintiffs' protagonist and T.V.A.'s antagonist, repeatedly recalling the literal language of the statute.

Justice Brennan, although not a particularly active questioner during the argument, does reveal his bias in favor of plaintiffs' position, which was subsequently confirmed by his joining in the majority opinion. For example, in connection with an inquiry concerning the relevance of continued congressional appropriations for the Tellico Project, and more specifically the \$2 million 1978 appropriation, the following exchange takes place:

JUSTICE BRENNAN: Mr. Attorney General, to what agency was that \$2 million appropriated?

ATTORNEY GENERAL BELL: TVA.

JUSTICE BRENNAN: And what is TVA supposed to do with it?

ATTORNEY GENERAL BELL: Carry on with their project to transplant the snail darter.

JUSTICE BRENNAN: In other words, to see if they can do something which will not jeopardize the continued existence of the species.

ATTORNEY GENERAL BELL: Right, which they have been doing.

JUSTICE BRENNAN: And if they fail?

ATTORNEY GENERAL BELL: Well, they haven't failed. But there's never been a hearing on that.

JUSTICE BRENNAN: Well, I know. The fact that Congress said, here's \$2 million; see if you can do something about preventing jeopardy to the continued existence of the species. I would think that that suggests that Congress intended if they can't, then they can't go on with the dam.

ATTORNEY GENERAL BELL: I say that Congress is trying to accommodate both problems.

JUSTICE BRENNAN: Well, all we know is a one-line appropriation, I take it, is it?

ATTORNEY GENERAL BELL: That's right, that's it.

Then you know what's in the committee reports. The committee reports three times in three years have said, go forward.

JUSTICE BRENNAN: Well, I know, but—

ATTORNEY GENERAL BELL: But it hasn't been in the statute.

JUSTICE BRENNAN: —did the committee report the statute? If it came to the President to veto, what would he veto, the committee report or the statute?

ATTORNEY GENERAL BELL: He'd veto the statute.⁵¹

Justice Brennan's only other remarks⁵² appear informational in content and do not seem to evidence very openly his predisposition toward plaintiffs' view.

Thus, although his participation is brief, Justice Brennan, nevertheless, does reveal his position relatively clearly. He seems to adopt the same strict statutory interpretation approach Justices Stevens and Stewart advocated concerning T.V.A.'s retroactivity and continued appropriations arguments. His questions relating to the proper congressional forum for exempting legislation and the absence of any mention of the conflict on the floor of Congress⁵³ remain unanswered by Attorney General Bell. Justice Brennan, therefore, appears to undermine quite successfully T.V.A.'s appropriations argument, foreshadowing his vote joining in Chief Justice Burger's majority opinion.

Just as Justices Stevens, Stewart, and Brennan serve as plaintiffs' protagonists and defendant's antagonists during the oral argument, Justice Powell clearly plays the opposite role and subsequently authored the primary dissent. He is silent until shortly before the conclusion of Attorney General Bell's presentation. Then, following the barrage of hostile questions described above relating to the force of the Secretary of Interior's biological findings, the deficiencies of T.V.A.'s appropriations argument, and the reviewability of the Secretary's determination of endangered status,⁵⁴ Justice Powell openly betrays his bias.

51. *Id.* at 25-27.

52. During the discussion of the Department of Interior's having taken a position contrary to the Department of Justice and the Tennessee Valley Authority, the following exchange between Justice Brennan and Attorney General Bell occurred:

JUSTICE BRENNAN: Perhaps you may have heard that when Mr. Justice Frankfurter was here he thought that was just outrageous on behalf of the Solicitor General to come here and offer us conflicting views of two Cabinet departments. And he said so.

ATTORNEY GENERAL BELL: I don't favor it myself.

JUSTICE BRENNAN: Well, the trouble is that in some instances Congress has expressly authorized it.

Record at 30.

Later, during Plater's argument, Justice Brennan asks only one question.

JUSTICE BRENNAN: Are you suggesting, Mr. Plater, that Congress may finally decide, we better abandon this whole dam? At least the dam?

Record at 48-49. Although this question may at first glance appear antagonistic toward Plater, its content reveals it as an attempt to elicit information concerning the steps Congress is taking to resolve the conflict, which is consistent with his eventual support of the majority's separation of powers position.

53. The one line lump-sum appropriation bill mentioned by Justice Brennan did not even mention the Tellico Project.

54. Record at 24-29.

JUSTICE POWELL: Mr. Attorney General, may I ask you a friendly question?

Let's assume that in order to resolve this issue, somebody introduced a bill in Congress saying explicitly that Section 7 shall apply to every completed Federal project in the United States. Do you think many Congressmen who voted for that clarification of this statute would be reelected?

ATTORNEY GENERAL BELL: No, but they wouldn't vote for it to begin with.

JUSTICE POWELL: That's my point. And doesn't that suggest that nobody, really no one, rationally, could apply this to a completed project?

ATTORNEY GENERAL BELL: It does to me, and under the Sixth Circuit holding, it would have to be applied.⁵⁵

Justice Powell continues:

JUSTICE POWELL: May I ask you one other, maybe less friendly, question? You commenced your argument, and I felt for you, by saying that it was not without precedent for two departments of the government to come to our Court in an antagonistic position.

It's not easy for us to resolve—I speak for myself—it's not easy for me to resolve issues of vast importance to our country when two Cabinet-level departments are at swords' point. I wonder why these things aren't determined at the Cabinet level rather than submitting them to us.

ATTORNEY GENERAL BELL: You say that's not so friendly. It's a very friendly question. It gives me an opportunity to say that I do not favor this system. We have one Attorney General and one Solicitor General, and I think that ought to be it.

But as long as you can do it, people will ask you to do it.⁵⁶

Justice Powell was either genuinely seeking an answer to the question why the Departments of Justice and Interior were at odds with one another, or he sensed that his fellow Justices would be disturbed by the difference of positions and wanted to afford Bell the opportunity to address the point before completing his argument.

Like his "friendly" attitude toward Attorney General Bell, Justice Powell's demeanor at the beginning of Plater's argument seems congenial and even suggests a balanced position, in contrast to the role he played earlier in Bell's argument.

JUSTICE POWELL: May I interrupt you right there? Apart from the

55. *Id.* at 29.

56. *Id.* at 29-30.

biological interest, which I say we do not challenge, what purpose is served, if any, by these little darters? Are they used for food?⁵⁷

Plater responds that the fish is not a food fish, but is highly sensitive to clean, cool, flowing river water and, thus, serves as an indicator of habitat quality for both non-human and human species. Revealing his sense of humor, Justice Powell, noting that he is a bass fisherman, then asks whether they are suitable for bait, to which Plater replies "no."⁵⁸ This apparent congeniality is, however, short-lived. Justice Powell apparently finally decides the appropriate time has arrived to probe deeply into plaintiffs' argument and reveal what he feels are its inadequacies. The following interchange was one of the longest between a single Justice and advocate. It is reproduced in its entirety to show Justice Powell at his best as an inquisitor, constantly thrusting and parrying, not giving Plater the luxury of the lengthy replies he had enjoyed earlier.

JUSTICE POWELL: May I come back to an argument you were making a few minutes ago that this dam, after all, is not important to what Congress intended. I read a few words from the Senate Appropriations Committee report last year: the project will provide needed flood control, water supply, recreational opportunities, improved navigation.

Now without the dam and the water in it, would any of those objectives of Congress be attainable?

MR. PLATER: Your Honor, it should be noted that the Appropriations Committee at no time has ever reviewed the GAO study, the reviews taking place in the other committees, and so on.

It turns out—

JUSTICE POWELL: That wasn't my question.

MR. PLATER: Your Honor, it is true that there would be no flood control, there would be no electric power in the project—

JUSTICE POWELL: No recreation?

MR. PLATER: No, that is not so, Your Honor. The river is the last place left in the river system that has high quality water conditions. It's the finest trout stream in the Southeast of the United States. People come from Alabama, Georgia, and all over to fish—

JUSTICE POWELL: You've got Mr. Stewart's vote already.

MR. PLATER: Your Honor, it is the last place for flowing water recreation. And as the GAO noted, because there have been so many impoundments—

57. *Id.* at 43.

58. *Id.* at 44.

JUSTICE POWELL: Do you think the Senate of the United States, or the Senate Appropriations Committee, was thinking about maintaining this stream when it was appropriating money to close the dam?

MR. PLATER: Your Honor, I believe that the relevant discussion is in the committee that has lawmaking jurisdiction over the Act, and they clearly are concerned about recreation; in the House side as well.

JUSTICE POWELL: Is there any record that the members of that committee voted against this appropriation?

MR. PLATER: Your Honor, the appropriations bill, on its face, does not purport to treat Tellico. It says nothing about Tellico.

JUSTICE POWELL: I understand the bill on its face doesn't. But do you think any rational person could read the reports of the committee for the last four or five years and conclude that there was any intention on the part of the Congress other than to complete this project?

MR. PLATER: Your Honor, I believe that one reading those reports would find clearly and specifically that, indeed, Congress had no intent to amend the Act. And that is one of the requirements for taking an appropriations bill, or an Appropriations Committee report, and reading out of it an informal, implied amendment. There must be some indication of an intent to amend.

As a matter of fact, in 1977, Senator Stennis specifically said, if we put such an amendment in here, it would be subject to a point of order. I think Your Honor's question, however, reflects the fact that certainly the Appropriations Committee, or certain members of it, probably didn't agree with the Endangered Species Act, or wish that it didn't apply in this case.

But there was no intention expressed to amend, and that is the only basis on which we could use that to change the law.

JUSTICE POWELL: Do you think that reflects any indication on the part of the Congress not to construe Section 7 as applying to completed projects?

MR. PLATER: I believe, Your Honor, that the appropriations bill—as every appropriations bill is passed—presumes that the agency will comply with all applicable relevant laws. Because the agencies are creatures of Congress.

JUSTICE POWELL: You apparently didn't hear my question, so I'll put another one to you.

Do you think—it is still your position, as I understand it, that this Act, Section 7, applies to completed projects? I know you don't think it occurs very often that there'll be a need to apply it. But does it apply if the need exists?

MR. PLATER: To the continuation—

JUSTICE POWELL: To completed projects. Take the Grand Coulee dam—

MR. PLATER: Right, Your Honor, if there were a species there—

JUSTICE POWELL: I'm not asking—

MR. PLATER:—it wouldn't be endangered by the dam.

JUSTICE POWELL: I know that's your view. I'm asking you not to project your imagination—

MR. PLATER: I see, Your Honor.

JUSTICE POWELL: —beyond accepting my assumption.

MR. PLATER: Right.

JUSTICE POWELL: And that was that an endangered species might turn up at Grand Coulee. Does Section 7 apply to it?

MR. PLATER: I believe it would, Your Honor. The Secretary of the Interior—

JUSTICE POWELL: That answers my question.

MR. PLATER: Yes, it would. The consequences of that, of course would—

JUSTICE POWELL: In what respects, Mr. Plater, would it apply? It would apply only to future action, wouldn't it?

MR. PLATER: Well, Your Honor, as we—

JUSTICE POWELL: It doesn't ever require anybody to tear anything down, does it?

MR. PLATER: It certainly says nothing about that in the Act, Your Honor. And that's why—

JUSTICE POWELL: It says you can't undertake certain actions in the future if they're going to extinguish a species. That's what it says, doesn't it?⁵⁹

It seems almost as if Justice Powell were attempting to ready Plater for the slaughter with his earlier friendly remarks. He reveals himself as a shrewd advocate with myriad techniques to extract what he desires.

Justice Powell's dissenting opinion predictably discloses no surprises. Much of its language is transparently reminiscent of the predisposition revealed during oral argument.

The Court today holds that § 7 of the Endangered Species Act requires a federal court, for the purposes of protecting an endangered species or its habitat, to enjoin permanently the operation of any federal project, whether completed or substantially completed. This decision casts a long shadow over the operation of even the most important projects, serving vital needs of society and national defense, whenever it is determined that continued operation would threaten extinction of an endangered species or its habitat. This result is said to be required by the "plain intent of Congress" as well as by the language of the statute.

59. *Id.* at 54-59.

In my view § 7 cannot reasonably be interpreted as applying to a project that is completed or substantially completed when its threat to an endangered species is discovered. Nor can I believe that Congress could have intended this Act to produce the "absurd result"—in the words of the District Court—of this case. If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce it. It is not our province to rectify policy or political judgments by the Legislative Branch, however egregiously they may disserve the public interest. But where the statutory language and legislative history, as in this case, need not be construed to reach such a result, I view it as the duty of this Court to adopt a permissible construction that accords with some modicum of common sense and the public weal.⁶⁰

The dissent further notes:

Today the Court, like the Court of Appeals below, adopts a reading of § 7 of the Act that gives it a retroactive effect and disregards 12 years of consistently expressed congressional intent to complete the Tellico Project. With all due respect, I view this result as an extreme example of a literalist construction, not required by the language of the Act and adopted without regard to its manifest purpose. Moreover, it ignores established canons of statutory construction.⁶¹

And further:

The result that will follow in this case by virtue of the Court's reading of § 7 makes it unreasonable to believe that Congress intended that reading. Moreover, § 7 may be construed in a way that avoids an "absurd result" without doing violence to its language.

The critical word in § 7 is "actions" and its meaning is far from "plain." It is part of the phrase: "actions authorized, funded or carried out." In terms of planning and executing various activities, it seems evident that the "actions" referred to are not all actions that an agency can ever take, but rather actions that the agency is *deciding whether* to authorize, to fund, or to carry out. In short, these words reasonably may be read as applying only to *prospective actions*, i.e., actions with respect to which the agency has reasonable decisionmaking alternatives still available, actions *not yet* carried out. At the time respondents brought this lawsuit, the Tellico Project was 80% complete at a cost of more than \$78 million. The Court concedes

60. 98 S. Ct. at 2302 (footnote omitted).

61. *Id.* at 2305 (footnote omitted).

that as of this time and for the purpose of deciding this case, the Tellico dam project is "completed" or "virtually completed and the dam is essentially ready for operation" Thus, under a prospective reading of § 7, the action already had been "carried out" in terms of any remaining reasonable decision-making power.⁶²

Justice Powell's final predictions follow quite directly as the logical conclusions of his inquiries at oral argument.

I have little doubt that Congress will amend the Endangered Species Act to prevent the grave consequences made possible by today's decision. Few, if any, Members of that body will wish to defend an interpretation of the Act that requires the waste of at least \$53 million, and denies the people of the Tennessee valley area the benefits of the reservoir that Congress intended to confer. There will be little sentiment to leave this dam standing before an empty reservoir, serving no purpose other than a conversation piece for incredulous tourists.

But more farreaching than the adverse effect on the people of this economically depressed area is the continuing threat to the operation of every federal project, no matter how important to the Nation. If Congress acts expeditiously, as may be anticipated, the Court's decision probably will have no lasting adverse consequences. But I had not thought it to be the province of this Court to force Congress into otherwise unnecessary action by interpreting a statute to produce a result no one intended.⁶³

In contrast to Justice Powell, Justice Rehnquist is remarkably inactive as a questioner during the oral argument. With one exception,⁶⁴ his few questions all attack the argument that an injunction is mandatory if a federal statutory violation is shown. Early in Attorney General Bell's argument, for example, Justice Rehnquist hears the term "balancing of equitable factors" and immediately probes further.

62. *Id.* at 2306-07.

63. *Id.* at 2309-10 (footnote omitted).

64. The sole exception to Justice Rehnquist's continued focus upon the equitable powers issue is surprisingly favorable to plaintiffs' position. After Justice Powell's probing of the snail darter's practical value, Justice Rehnquist asks:

JUSTICE REHNQUIST: Mr. Plater, isn't it at least an arguable part of the intent of Congress that the Government simply leaves certain areas of nature alone, without necessarily having a reason for leaving them alone, but just that they didn't want any more elimination of species and so forth.

Record at 45-46.

This inquiry seems unusual in light of Justice Rehnquist's other questions. Perhaps he is merely attempting to terminate this line of questioning concerning species value, because it is quite clear from the Act that broad species preservation goals, not specific economic justifications, were contemplated by Congress. See 16 U.S.C. § 1531 (1976).

ATTORNEY GENERAL BELL: So that's the issue that is presented, the issue that must be resolved: Can there be a balancing of the equitable factors in deciding whether this action taken in the meaning of the statute can be taken.

JUSTICE REHNQUIST: General, when you say "balancing the equitable factors," is one of the ways that would be done the decision of the District Court or the Court of Appeals whether an equitable injunction would issue?

ATTORNEY GENERAL BELL: That's it, yes, sir.⁶⁵

Later, in Plater's argument, Justice Rehnquist further manifests his feeling that this issue is dispositive of the case. That is, he believes that even if a statutory violation exists, the trial court had discretion to decide whether or not to issue an injunction based upon a weighing of all relevant factors.

JUSTICE REHNQUIST: But Hecht against Bowles says you don't get an injunction automatically for a statutory violation.⁶⁶

Plater then poses the hypothetical of a dam project with a whooping crane population endangered by the impoundment and states that, in his opinion, the trial court could not decide the essentially legislative question of what should be done with the dam, which would require delving into cost accounting to determine the dam's true value.⁶⁷ Justice Rehnquist counters:

JUSTICE REHNQUIST: I don't agree with you Mr. Plater. Because you have a long history of equitable adjudication where, for instance, a building is built over a lot line, and there has been a contest throughout, but the chancellor doesn't reach a decision until the building is finally built. And he may say, applying the common law, which has the same sanction to him as the legislative laws passed by Congress, I will give you damages, I will not give you an injunction.

Now why isn't this an appropriate case for that sort of an adjudication?

MR. PLATER: Several reasons; number one is, Your Honor noted damages of course is not a remedy. Once a species is rendered extinct, as Congress said, it's extinct forever.

Secondly, of course, that would be involving private practice under the common law. This Court has repeatedly said that in cases which involve a Congressional statute, that indeed, the principle which guides the Court in the exercise of its discretion is enforcing the law, which has not been set up by common law but by statute.

65. Record at 11-12.

66. *Id.* at 51.

67. *Id.* at 52-53.

JUSTICE REHNQUIST: It's completely opposite in *Hecht* against *Bowles*.

MR. PLATER: No, Your Honor; we are not arguing that an injunction must be issued. Under the *Hecht* case—

JUSTICE REHNQUIST: That is, if there were voluntary compliance, and an injunction wouldn't be necessary. And that was *Hecht v. Bowles*.⁶⁸

Justice Rehnquist's dissent mirrors the trend of his remarks during oral argument.

In the light of my Brother POWELL's dissenting opinion, I am far less convinced than is the Court that the Endangered Species Act of 1973, 16 U.S.C. § 1531 et seq., was intended to prohibit the completion of the Tellico Dam. But the very difficulty and doubtfulness of the correct answer to this legal question convinces me that the Act did *not* prohibit the District Court from refusing, in the exercise of its traditional equitable powers, to enjoin petitioner from completing the Dam.⁶⁹

He concludes his opinion:

Since the District Court possessed discretion to refuse injunctive relief even though it had found a violation of the Act, the only remaining question is whether this discretion was abused in denying respondents' prayer for an injunction. The District Court denied respondents injunctive relief because of the significant public and social harms that would flow from such relief and because of the demonstrated good faith of petitioner. As the Court recognizes, such factors traditionally have played a central role in the decisions of equity courts whether to deny an injunction.

Since equity is "the instrument for nice adjustment and reconciliation between the public interest and private needs," a decree in one case will seldom be the exact counterpart of a decree in another. Here, the District Court recognized that Congress when it enacted the Endangered Species Act made the preservation of the habitat of the snail darter an important public concern. But it concluded that this interest on one side of the balance was more than outweighed by other equally significant factors. These factors, further elaborated in the dissent of my Brother POWELL, satisfy me that the District Court's refusal to issue an injunction was not an abuse of its discretion. I therefore dissent from the Court's opinion holding otherwise.⁷⁰

68. *Id.* at 53-54.

69. 98 S. Ct. at 2310.

70. *Id.* at 2311 (citations omitted).

Justice Rehnquist's position is, therefore, quite predictable. He identifies one issue as the crux of the controversy, probes that issue, openly exposes his bias, and subsequently authors a dissenting opinion based precisely upon that point.

Although at the actual oral argument, Justices Stevens, Stewart, and Brennan seemed clearly to favor plaintiffs' position and Justices Powell and Rehnquist appeared openly to support the Tennessee Valley Authority, which impressions were subsequently confirmed by the majority and dissenting opinions, Justices Blackmun and White seemed more equivocal in their attitudes toward the controversy. Examination of the record, however, portrays a somewhat clearer indication of their predispositions.

Although an exchange between Justice Blackmun and Bell late in the argument appears to reveal the Justice's support of the government's position, Justice Blackmun's earlier questions to Bell and Plater do not significantly unmask his bias. For instance, requesting further information, the Justice at an early point questions Bell:

JUSTICE BLACKMUN: Attorney General Bell, there is something in the briefs about efforts at transplantation. And I wondered, can you bring us up to date on that? Have they been successful? And secondly I would like to know whether the construction already done to the dam has so endangered the species that it is not going to survive anyway.⁷¹

Later, at the onset of plaintiff-respondents' argument, Justice Blackmun attacks Plater for his characterization of the Sixth Circuit decision as "unanimous."

JUSTICE BLACKMUN: Mr. Plater, Judge McCree did write separately below, didn't he? Do you feel that he was, however, joining the majority opinion?

MR. PLATER: Yes, Your Honor. Judge McCree below said that he concurred with the result of the Court's opinion; the fact, also, that indeed the TVA project must be enjoined because it would eliminate the species from the face of the Earth.

JUSTICE BLACKMUN: Well, many times when we appear particularly to concur in the result, it means we think the majority opinion was rather poor, and we have reasons of our own.

MR. PLATER: Your Honor, I don't want to second guess Judge McCree, but it might be noted—

JUSTICE BLACKMUN: Well, you said it was a unanimous opinion. It may be a unanimous judgment, but I wanted to—

71. Record at 7-8.

MR. PLATER: Unanimous position taken by the Sixth Circuit that this project should be enjoined. Thank you, Your Honor.⁷²

Whether Justice Blackmun was in fact evidencing hostility to plaintiffs' position or merely demanding precise use of language was unclear in plaintiffs' minds at the time.

The apparent feelings underlying some of Justice Blackmun's questions to Bell, however, should have alerted plaintiffs to his support of T.V.A.'s position. For example, when the Attorney General has difficulty answering Justice White's inquiry as to whether the government's position is that there is no violation of the Act or that there is a violation, but an injunction should not issue,⁷³ Justice Blackmun plays the same role for Bell that Justice Stevens played for Plater, attempting to aid him in his presentation.

JUSTICE BLACKMUN: Mr. Attorney General Bell, I understood your principal argument to be that the statute could not fairly be construed to apply to a project that was either completed or substantially completed.

ATTORNEY GENERAL BELL: Well, but that would be like—now if a court has jurisdiction, *Bell v. Hood*, you have to have a hearing to find out if you have jurisdiction. You'd have to have a hearing to see if the statute could be read as applying to these particular facts.

JUSTICE BLACKMUN: I understand you'd have to have a hearing. But if the facts were simply this, that the main dam in the Tennessee Valley is completed—nobody argues that it is not completed, it's been 30 or 40 years.

ATTORNEY GENERAL BELL: Right.

JUSTICE BLACKMUN: Suppose they found a snail darter down in that lake tomorrow. The Secretary of the Interior claims you must remove the dam.

ATTORNEY GENERAL BELL: That's exactly right.

JUSTICE BLACKMUN: Now do you think the statute applies to that?

ATTORNEY GENERAL BELL: Well, I don't think the statute can be applied to that.

JUSTICE BLACKMUN: Do you think it could be construed reasonably to think that the Congress of the United States would require that that dam be removed?

ATTORNEY GENERAL BELL: I do not. That would be a completed project, farther than our case.

JUSTICE BLACKMUN: My question was addressed to a completed

72. *Id.* at 34.

73. See text accompanying note 82 *infra* for Justice White's questions on this point.

project or one substantially completed. And you told us that at the beginning of this argument that all that was necessary to be done was to close the gate.

ATTORNEY GENERAL BELL: Close the gate plus—that's the dam. Now, there are roads to be completed. There's a little—there's a million point—\$1.3 million in the '79 budget, but that's to complete some roads and bridges.

The dam itself is finished. All the landscaping has been done and that sort of thing. So it is completed.

But I've not argued that it's the sort of thing, say, where a road has been finished, and five years later they found something there, an endangered species, and they say, would they remove the road.

Here, a good example would be if they found a plant growing on the bank of this lake. Sometimes when they had the water down during the winter time, they'd lower the water five feet, and they found this plant. And they say, you never raise the water back up; because there's still action to be taken. There was a little action left to be taken here.

JUSTICE BLACKMUN: A tiny, little bit?

ATTORNEY GENERAL BELL: A little, just very little, but a little.

JUSTICE BLACKMUN: How much money has the Government spent on this project?

ATTORNEY GENERAL BELL: \$110 million.

JUSTICE BLACKMUN: \$110 million. The government has appropriated \$2 million to transplant these darters.

ATTORNEY GENERAL BELL: I hadn't gotten to that.

JUSTICE BLACKMUN: Very important.⁷⁴

This exchange clearly reveals Justice Blackmun's support of T.V.A.'s argument concerning retroactivity based upon implied congressional intent, and his attachment of importance to the funds already spent on the project and the \$2 million appropriation for current transplantation efforts. Thus, although Justice Blackmun's position was not readily apparent to plaintiffs during oral argument, perhaps because of the few times he engaged in questioning and their being spread throughout the argument, re-examination of his remarks makes it reasonably unsurprising that he joined in Justice Powell's dissenting opinion, which focused upon T.V.A.'s arguments concerning retroactivity, continued appropriations, and amount of money spent on, or stage of completion of, the project.⁷⁵

Like Justice Blackmun, Justice White seemed somewhat of an enigma during the actual hearing. Analysis of the record of

74. Record at 17-19.

75. See text accompanying notes 60-62 *supra*.

proceedings discloses little of his underlying attitude toward the case. It does, however, reveal him as relishing several opportunities to vent his feelings against both advocates and being primarily interested in a resolution that would relieve the Supreme Court from playing any significant role in the dispute, which may be predictive of his eventual position. Twice during Bell's argument, for example, he emphatically corrects a point the Attorney General has made or an impression he has conveyed. Thus, in response to Bell's early recounting of the alleged success of the T.V.A. transplantation program, a characterization clearly open to question,⁷⁶ Justice White notes:

JUSTICE WHITE: You say this is in the—it's not in the record in this case.

ATTORNEY GENERAL BELL: Some of it's in the record—not the success story. It's in public documents that were filed with the Secretary when they tried to take the—there's a petition filed to take the snails—

JUSTICE WHITE: Of course, everything in these documents may not be true.⁷⁷

Similarly, after Bell expresses his opinion that the government should speak only through the Attorney General, notes that opposing positions among cabinet level officers are most unusual in federal litigation, and states in reference to this case that "[i]t's the only time we've done it since I've been Attorney General,"⁷⁸ Justice White interjects:

JUSTICE WHITE: Mr. Attorney General, with regard to your statement a moment ago about other agencies of the Government taking their own position here contrary to what the Solicitor General might be, I indicated that Congress has expressly authorized it in some instances.

ATTORNEY GENERAL BELL: Right.

JUSTICE WHITE: And I just suggested that this afternoon or tomorrow we're hearing a case in which the Federal Communications Commission is taking a position flatly contrary to the Department of Justice on a case. It's not a rarity.

ATTORNEY GENERAL BELL: The Interstate Commerce Commission does it. But those are by statute. This is not a statute.

JUSTICE WHITE: Okay, exactly, right.⁷⁹

76. See, e.g., Brief For Respondents at 17, *T.V.A. v. Hill*, 98 S. Ct. 2279 (1978); *TENNESSEE VALLEY AUTHORITY AND U.S. DEP'T OF INTERIOR, ALTERNATIVES FOR COMPLETING THE TELlico PROJECT 5* (draft report, August 10, 1978).

77. Record at 8.

78. *Id.* at 31.

79. *Id.* at 32-33.

In plaintiff-respondents' argument, Justice White again vents his feelings. Thus, after Plater summarizes plaintiffs' position as his argument time expires, Justice White apparently feels a need to conclude the hearing by expressing his attitude that the resolution of the case is by no means clear in his mind.

JUSTICE WHITE: Well, I understand what your position is and what the law means. But if somebody happened to disagree with you as to how to construe the Act, it might be that the agency isn't violating the law at all.

Your argument is what the law means.

MR. PLATER: Only TVA is making that argument.

JUSTICE WHITE: Nevertheless, your statement is absolutely incorrect unless the Act is construed the way you say it should be construed.

MR. PLATER: Yes, Your Honor, if this Act is discretionary the way the old law was written, if this Act doesn't mean what it says, then, indeed, this—

JUSTICE WHITE: But one of the issues in the case is, what does the Act mean.

MR. PLATER: The regulations of the Department of the Interior; every holding in the case so far—

JUSTICE WHITE: I understand. You're arguing that it should be construed in a certain way. But some other people disagree with you.

MR. PLATER: They do.

Thank you, Your Honors.⁸⁰

With the exception of these attempts by Justice White to correct inaccuracies in the presentations, his remarks seem aimed at understanding Bell's argument and at developing a way for the Court to avoid deciding the substantive issues presented by the case. Thus, before Justice Blackmun attempts to help Bell restate the government position as to whether there is no statutory violation or whether there is a violation conceded but a contention that an injunction is inappropriate,⁸¹ Justice White prods the Attorney General to make his views more clear.

JUSTICE WHITE: So on any of the grounds that you are suggesting, you're suggesting that the statute itself be construed so that there's no violation here if these gates are closed?

ATTORNEY GENERAL BELL: That's it.

JUSTICE WHITE: There's no violation of the statute at all?

ATTORNEY GENERAL BELL: Right.

80. *Id.* at 62.

81. See text accompanying notes 73 and 74 *supra*.

JUSTICE WHITE: And although the statute applies, you construe the statute based on various facts.

ATTORNEY GENERAL BELL: The balance in the factors—I would say it applies.

JUSTICE WHITE: Your argument isn't that it's a violation of the statute, but an injunction isn't authorized.

ATTORNEY GENERAL BELL: That's it.

JUSTICE WHITE: That isn't your argument, is it?

ATTORNEY GENERAL BELL: That is my argument.

JUSTICE WHITE: You don't concede there's a violation of the statute, though.

ATTORNEY GENERAL BELL: No, not unless—

JUSTICE WHITE: You construe the statute so that closing the gates wouldn't violate the statute?

ATTORNEY GENERAL BELL: That would prevent there being a violation. The factors, the facts, taken as a whole, would prevent there being a violation of the statute.

I don't concede—I concede the statute applies; though. I think it does apply.⁸²

This line of questioning appears to be a genuine attempt to understand Bell's position and does not seem to disclose a particular predisposition on Justice White's part.

More obvious betrayals of Justice White's attitude appear in his inquiries relating to the possibility of remanding the matter to the district court. He clearly feels the record is deficient in information concerning transplantation success and recent congressional appropriations. He further believes the Secretary of Interior's refusal to remove the snail darter from endangered status may be reviewable by the trial court, which would also enable the Supreme Court to avoid rendering a substantive decision at this point.

JUSTICE WHITE: Well, Mr. Attorney General, why shouldn't there—why shouldn't the Court remand this case to have the record brought up to date?

ATTORNEY GENERAL BELL: Well, I—

JUSTICE WHITE: A lot of things have happened since the Court of Appeals decided it.

ATTORNEY GENERAL BELL: That's exactly right.

And you might well want to do that. I think that the Sixth Circuit is in error.

JUSTICE WHITE: Well has anybody—is the Secretary's refusal to remove the fish from the list—he's done that in the last two or three months, you say. Or is it the habitat?

82. Record at 16-17.

ATTORNEY GENERAL BELL: Well, he didn't have a hearing on it.

JUSTICE WHITE: Well, he refused, though, didn't he?

ATTORNEY GENERAL BELL: He refused.

JUSTICE WHITE: Is that subject to judicial review?

ATTORNEY GENERAL BELL: I don't know.

JUSTICE WHITE: If it is, is it—has review been sought?

ATTORNEY GENERAL BELL: I think it could be—I think you could have a review on denial of due process, to begin with, if you couldn't get a hearing.

JUSTICE WHITE: Well, I know, but is the Secretary—you just don't know whether there are procedures to secure review of the Secretary's refusal to remove the snail darters—⁸³

Justice White's questions and comments disclose little about his position on the substance of the controversy. He clearly prefers that the Court not deal with the controversy at this point, but either remand for further fact-finding, or require T.V.A. to seek judicial review of Interior's refusal to remove the fish from the endangered species list. He, nevertheless, joins in the majority opinion upholding the enjoining of the project's completion. One can only speculate that he may have been convinced by Justices Stevens's and Stewart's arguments that a violation exists, and therefore, an injunction is appropriate, the uncertainty of the transplantation efforts and appropriations notwithstanding. It may be that Justice White eventually viewed plaintiffs' argument as a compromise relieving the Supreme Court from affirmative decision-making responsibility. That is, plaintiffs did not argue the dam should never be closed, but only that, given a specific statutory violation, a decision to exempt a federal agency from the statute's operation based upon a weighing of costs and benefits was a legislative, not a judicial, function. The majority opinion adopts this separation of power reasoning and actually preserves the status quo. It requires the Supreme Court to take no action and leaves the injunction in effect until Congress exempts the project or the Secretary removes the fish's endangered status. Perhaps Justice White felt more comfortable with this outcome than with the dissents' arguments for reversal. The majority opinion is, at very least, analogous to his view favoring involving the Court as little as possible.

Earlier discussion in this article concluded that the eventual positions taken by Justices Stevens, Stewart, Brennan, Powell, and Rehnquist are readily predictable based upon examination of their questions and comments during oral argument. It was fur-

83. *Id.* at 27-28.

ther noted that, whereas Justices Blackmun and White may have appeared more equivocal at the actual hearing, closer analysis of the record reveals their later positions as being reasonably predictable. The remarks of Justices Marshall and Burger, however, even after re-examination of the transcript, remain perplexing in contrast to the positions they ultimately adopted supporting plaintiffs' argument.

Throughout the argument, Justice Marshall appears hostile toward plaintiffs and appears to treat the snail darter's plight as frivolous. During Attorney General Bell's argument, for example, he asks:

JUSTICE MARSHALL: Mr. Attorney General, what would happen if they found snail darters in the basement of this building? Would they tear the building down, this building?

ATTORNEY GENERAL BELL: I don't know; you'd have to ask the Sixth Circuit that. I think they'd enjoin you from functioning if they found it to be a critical habitat.⁸⁴

Later, Justice Marshall returns to this analogy:

MR. PLATER: [A]fter 68 dams through the TVA river system, 68 of them, one after the other, the range of the snail darter has apparently been destroyed, one by one, until this last 33 river miles is the last place on Earth where the species, and human beings as well, have the quality of the habitat.

JUSTICE POWELL: So that's the last place it's been discovered, I take it?

MR. PLATER: Your Honor, TVA has looked everywhere for snail darters.

[Laughter.]

JUSTICE MARSHALL: They haven't searched the basement of our building yet; that's what I'm worried about.

MR. PLATER: Your Honor, if snail darters were in the basement of this building, then I suspect they would not be in danger. They would have found them, Your Honor, and there would be a bounty on the snail darters' heads.⁸⁵

Whether Justice Marshall is merely displaying his sense of humor or exposing a feeling that plaintiffs' lawsuit is trivial in nature is difficult to discern from these questions alone. Later comments, however, seem to reveal Justice Marshall's hostility to plaintiffs' case more clearly.

JUSTICE MARSHALL: Suppose you found snail darters around Chickamauga Dam on the TVA, what would you do?

84. *Id.* at 23.

85. *Id.* at 44.

MR. PLATER: Your Honor, that is a question also like the question asked by Mr. Justice Powell. And the point is, biologists tell us that if you could find a species in a completed project, that would be a biological indication that that population was not endangered by the dam, because, indeed, it was living there, established there, and breeding, and of course, no completed dam would have to be taken down.

JUSTICE MARSHALL: Well, suppose the Department of the Interior said it was?

MR. PLATER: Your Honor, the Department of the Interior—

JUSTICE MARSHALL: You'd have to tear Chickamauga Dam down.

MR. PLATER: No, Your Honor, all they have is biological authority to assert that the endangered species is there, and is threatened by the present circumstances.

JUSTICE MARSHALL: Well, suppose they say that?

MR. PLATER: Well, Your Honor—

JUSTICE MARSHALL: And they're wrong?

MR. PLATER: If they're wrong, then this answers a question posed also by Mr. Justice White. There are proceedings currently underway in District Court in Tennessee challenging another listing of an endangered species, arguing that the Department of the Interior is wrong.

That is the way to do it. The biological opinion of the Secretary, once established, is established, and is not to be overturned by lawyers trying to debate biology.⁸⁶

Justice Marshall is similarly antagonistic later in plaintiffs' argument when Plater refers to information not in the record.

MR. PLATER: Congress, indeed, is saying that although we've lost, not \$120 million, but something far less than half of that, the value of the remainder may be several times greater than the purported claims for the dam.

That is to say, Congress is reviewing it, and I'm pleased to announce that the agencies are reviewing it as well. In the reply brief of TVA, it is noted that the new director of TVA has agreed that the dam is not integral to this project. The project has benefits which can be achieved as well or better without the destruction of the valley by a reservoir. And secondly, I was informed just today, Your Honors, that the Secretary of the Interior has requested—

JUSTICE MARSHALL: Well, just speaking for myself, I'm not interested in what you discovered today. I've got a record here.

MR. PLATER: Your Honor, our case is fully sufficient on the record. It shows that there is a violation, it shows that Congress,

86. *Id.* at 35-36.

in the law-making committees, is considering exactly the question Your Honor—

JUSTICE MARSHALL: But doesn't the record also show that this dam was not for hydraulic purposes?

MR. PLATER: That's exactly right, Your Honor.

JUSTICE MARSHALL: Why don't you say that instead of what you were told today? Because that's in the record.⁸⁷

Once again, it is difficult to arrive at a comfortable conclusion as to whether Justice Marshall is genuinely hostile toward plaintiffs or merely opposed to the Court's considering events not in the written record.

In retrospect, despite the negativism he seems to display toward Plater, perhaps Justice Marshall was tactfully attempting to force Plater to present the best possible case and help him avoid diminishing the credibility of plaintiffs' argument through interjection of information not in the record. Although this certainly did not seem to plaintiffs to be the Justice's purpose at the time of actual questioning, one inquiry late in Plater's presentation does vaguely suggest a predisposition on the part of Justice Marshall toward helping Plater refine his position. Justice Powell has asked Plater whether discovery of an endangered species in the reservoir behind the Grand Coulee Dam would require tearing down the dam.

MR. PLATER: If that situation would arise, Your Honor, it would probably be a biological rarity, in the sense that if the species comes when the water goes up and down, then it's established that it's not endangered.

Maybe the way to answer this is on the basis of the administrative record. Because in the hearings last summer, the Culver hearings in the Senate, it was again and again noted that the biological expertise of the Department of the Interior is capable of handling many sophisticated such questions. And there has never been a case that could not be resolved through good faith and administrative consultation. There have been 4,500 potential conflicts. There have been hundreds of actual conflicts. But only TVA testified that the Act was unworkable. Every other administrative agency said that, although the Act was sometimes a bother, that they could resolve those conflicts.

JUSTICE MARSHALL: Getting back to—why don't you rely on the fact that even though a facility is all built, if you knew about it when you started building—isn't that what you say?

87. *Id.* at 49-50.

MR. PLATER: That was the situation in this case, Your Honor.

JUSTICE MARSHALL: That's what I mean.⁸⁸

Thus, at this late point in the hearing, Justice Marshall almost appears to play the same helpful role for Plater as Justice Stevens played earlier and as Justice Powell did for Bell. His position, however, is by no means clear.

Justice Marshall's only other major comments parallel Justice White's inclination to remand the case for further fact-finding on the transplantation issue. Justice Marshall's comments once again appear hostile toward Plater, and some of his remarks again seem to treat the matter as frivolous.

JUSTICE MARSHALL: Do we know the facts right now? Do we know how many snail darters are there?

MR. PLATER: We know approximately, Your Honor. And this is—

JUSTICE MARSHALL: Well, how many have been removed?

MR. PLATER: In the present case, Your Honor, we do not have a full record on the transplantation. But—

JUSTICE MARSHALL: Do we need that? Don't we need that? Suppose where they're now living, they are six and eight inches long, and just having a ball. Would you all—

[Laughter.]

JUSTICE MARSHALL: —would your argument be the same?

MR. PLATER: Your Honor—

JUSTICE MARSHALL: Would your argument be the same?

MR. PLATER: No, Your Honor, it would not be, if the Secretary of the Interior—

JUSTICE MARSHALL: You wouldn't have any argument, would you?

MR. PLATER: Your Honor—

JUSTICE MARSHALL: Shouldn't we find that out?

MR. PLATER: Your Honor, if the Secretary of the Interior changes the listing of the species and the critical habitat, then clearly this case is no longer—

JUSTICE MARSHALL: That was not my question.

MR. PLATER: Excuse me, I misunderstood.

JUSTICE MARSHALL: My question was: Should we know what the transplanted snail darters, how they're faring? Shouldn't we know that before we decide this case?

MR. PLATER: Your Honor, the situation—

JUSTICE MARSHALL: I'm not talking about the Secretary of the Interior; I'm talking about us.

MR. PLATER: All right. Your Honor, the factual situation pre-

88. *Id.* at 59-60.

sented in our brief is up to date as well as is known by anyone. And that is this situation.

TVA claims that approximately 2,000 fish now exist in the Hiwassee. But as they revealed in the Senate hearings, and noted at footnote 26 in our brief—

JUSTICE MARSHALL: Well, then, how can we—you're now getting ready to say that what they say is not true.

MR. PLATER: Your Honor, that is based—

JUSTICE MARSHALL: How can we know what's true?

MR. PLATER: Because—

JUSTICE MARSHALL: We're not a fact finding body.

MR. PLATER: Your Honor, that's correct. The TVA's biological data perhaps is determinative here. In December of last year, they did transects in the Hiwassee River, and they revealed, out of 710 fish that were put in, 5 fish left in the transects on the original shoals, and I believe it was 9 juveniles near the flowage of the Ocoee River. That is the latest scientific evidence on how many fish are in the Hiwassee.

TVA therefore concluded that the transplant—

JUSTICE MARSHALL: If I may correct you, that's the latest scientific evidence that you know about.

MR. PLATER: Your Honor, I've checked the records of the Secretary of Interior.

JUSTICE MARSHALL: Well, I mean, suppose there are some other records available. Do you seriously object to this going back?

MR. PLATER: Your Honor, there may be reasons for this case to be remanded. However, transplantation is not a fulfillment of the Act, and therefore, that would be an incidental inquiry.⁸⁹

Perhaps the author misinterpreted Justice Marshall's remarks throughout the actual argument. On their face, they certainly appear unfriendly toward plaintiffs' position, though a few of them might be characterized as attempts to help Plater structure his answers more precisely. If Justice Marshall was principally disposed toward remanding the case, then one can speculate that he might have eventually been convinced to join the majority for the same reasons Justice White may have done so—as a compromise position that would relieve the Court from rendering a decision on the merits. Justice Marshall, however, more so than Justice White, seems genuinely interested in learning more about the transplantation success and obviously views it as significant. His support of a remand appears less than Justice White's to be based upon general notions of Supreme Court nonintervention. He may, nevertheless, have been influenced by the Stevens-

89. *Id.* at 39-41.

Stewart literal interpretation of the statute and may have viewed his not joining the majority as a vote numerically threatening an outright reversal, which he probably did not favor. Despite these possible explanations, his judicial behavior and eventual position joining in the majority view remain somewhat bewildering.

While Justice Marshall's comments and subsequent position present at least an arguably reconcilable pattern, Chief Justice Burger's remarks and majority opinion manifest a total paradox. Among the nine members of the Court, it is his position that is clearly the least predictable and, therefore, the most perplexing. In the record, the Chief Justice appears consistently opposed to plaintiffs' arguments and supportive of T.V.A.'s arguments concerning the issues of retroactivity, congressional appropriations, effect of amount of funds expended, transplantation, and equitable powers. His majority opinion is totally contrary to these attitudes.

For example, after Attorney General Bell states his position that to enjoin the project's completion would be an impermissible retroactive application of the 1973 Act, the Chief Justice immediately attempts to help Bell by rephrasing T.V.A.'s position more persuasively. In so doing, he also betrays his attachment of significance to the amount of public funds already spent on the project.

CHIEF JUSTICE BURGER: What you're saying, I take it, is that the Endangered Species Act is not to be applied, was not intended by Congress to be applied, to projects that were already underway.

ATTORNEY GENERAL BELL: Well, I think it does apply—no, I'm not saying it doesn't apply. It does apply, but then you consider what stage of development is the project in. What are the reasonable alternatives? Could you change it? Could you change the design?

CHIEF JUSTICE BURGER: Is one of the factors to be weighed the fact that \$120 million has been spent—

ATTORNEY GENERAL BELL: Exactly.

CHIEF JUSTICE BURGER: —at this point.

ATTORNEY GENERAL BELL: That would be one, and the District judge weighed that.⁹⁰

Later, during Plater's argument, Chief Justice Burger again exposes his feelings concerning the dollars expended. Plater is being questioned on the practical worth of the snail darter, and Justice Rehnquist has noted that Congress may have had as its purpose in enacting the statute the preservation of species and conserva-

90. *Id.* at 14.

tion of areas of nature as ends in themselves, regardless of proven specific values. Plater replies, followed by the Chief Justice:

MR. PLATER: The Devil's Hole Pupfish case, which this Court decided, was such a case, where there was one small area that was made into a reserve. This Court unanimously upheld that reservation.

CHIEF JUSTICE BURGER: We weren't faced with the conflict between the pupfish and a \$120 million dam, though.⁹¹

Further on the issue of the Act's application to projects already constructed, Chief Justice Burger asks:

CHIEF JUSTICE BURGER: Let me pursue a question that Mr. Justice Marshall put to you. Suppose that you have a \$3 or \$400 million dam—I don't know the value of the—the cost of the one he mentioned—and you are confronted with a showing that originally there were 300,000 of a particular species, and now by the operation of the dam over a period of years, it's down to 10,000, and it's about to become extinct.

Are you suggesting that Congress intended that that dam should be torn down?

MR. PLATER: Your Honor, that of course is not this case—

CHIEF JUSTICE BURGER: Well, I know; I'm asking you hypothetical questions, to test your argument. As we did with the Attorney General.

MR. PLATER: Your Honor, the question is whether there is a remaining prospective Federal action which will jeopardize a species. It's clear under the Act that the Agency does have a statutory duty to take measures to try to conserve the existence of the darter.

But the question of whether, in a situation where there are no Federal actions remaining, nevertheless—

CHIEF JUSTICE BURGER: The Federal action is the continuance of the dam.

MR. PLATER: In that situation, Your Honor, that is certainly a question that would have to be raised. We do not take a position on that argument.⁹²

Last, near the completion of Plater's argument, after Justice Marshall comments that plaintiffs should rely on the point that even if a facility is totally completed, knowledge of the existence of an endangered species might be significant, Chief Justice Burger returns to the retroactivity issue:

91. *Id.* at 46.

92. *Id.* at 37-38. Justice Powell later forces Plater to take a position on this issue. See text accompanying note 59 *supra*. Plater answers that the Act would apply to a completed project—a position he perhaps need not have taken.

CHIEF JUSTICE BURGER: Well, then this litigation—when this litigation first began to block the development of the project, there was no snail darter problem involved, was there?

MR. PLATER: The NEPA suit, Your Honor, which was filed in 1971, noted that there possibly were endangered species in the river. TVA had notice. But at that time, of course, Your Honor, it was the old Act, which allowed the TVA to have the discretionary flexibility that they're now trying to read into this Act, applied.

CHIEF JUSTICE BURGER: When the snail darter was discovered, and became a handy handle to hold onto.

MR. PLATER: Your Honor, the question of the snail darter clearly went specifically to the qualities of this habitat, that as you suggest, the citizens have been concerned about for years; that is to say, the last free flowing clear such big river left in this region.

CHIEF JUSTICE BURGER: I'm sure that they just don't want this project, for a combination of reasons.

MR. PLATER: Your Honor, there are a combination of plaintiffs in this case, many with different points of view.⁹³

Thus, the Chief Justice also exposes his quite hostile feeling that the plaintiffs are opportunists who in some way acted almost unethically in filing the lawsuit.

It is bewildering to examine Chief Justice Burger's majority opinion references to the alleged retroactive application of the statute after reviewing his comments on that issue made during oral argument. Consider the following excerpt:

One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized, funded, or carried out* by them to not jeopardize the continued existence" of an endangered species or "*result in the destruction or modification of habitat of such species . . .*" 16 U.S.C. § 1536. (Emphasis added.) This language admits of no exception. Nonetheless, petitioner urges, as do the dissenters, that the Act cannot reasonably be interpreted as applying to a federal project which was well under way when Congress passed the Endangered Species Act of 1973. To sustain that position, however, we would be forced to ignore the ordinary meaning of plain language.⁹⁴

Similarly, after a lengthy discussion of the legislative history of the 1973 Act, the Chief Justice notes:

93. Record at 60-61.

94. 98 S. Ct. at 2291.

It is against this legislative background that we must measure TVA's claim that the Act was not intended to stop operation of a project which, like Tellico Dam, was near completion when an endangered species was discovered in its path. While there is no discussion in the legislative history of precisely this problem, the totality of congressional action makes it abundantly clear that the result we reach today is wholly in accord with both the words of the statute and the intent of Congress. The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.⁹⁵

And once again:

Furthermore, it is clear Congress foresaw that § 7 would, on occasion, require agencies to alter ongoing projects in order to fulfill the goals of the Act.⁹⁶

Chief Justice Burger then specifically attacks Justice Powell's argument that the majority decision gives retroactive effect to the statute.

Mr. Justice POWELL characterizes the result reached here as giving "retroactive" effect to the Endangered Species Act of 1973. We cannot accept that contention. Our holding merely gives effect to the plain words of the statute, namely that § 7 affects all projects which remain to be authorized, funded, or carried out. Indeed, under the Act there could be no "retroactive" application since, by definition, any *prior* action of a federal agency which *would* have come under the scope of the Act must have already *resulted* in the destruction of an endangered species or its critical habitat. In that circumstance the species would have already been extirpated or its habitat destroyed; the Act would then have no subject matter to which it might apply.⁹⁷

These statements are, at very least, surprising given the trend evident in Chief Justice Burger's questions concerning application of the Act to a project already substantially completed.

Similarly, the Chief Justice's apparent concern for the millions of dollars spent on the Tellico Project cannot easily be reconciled with the following statement from his opinion:

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of

95. *Id.* at 2296-97 (footnote omitted).

96. *Id.* at 2297 (footnote omitted).

97. *Id.* at 2297-98 n.32.

many millions of dollars in public funds. But examination of the language, history and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.⁹⁸

It should be noted, however, that a footnote to the preceding statement did indicate that:

The District Court determined that failure to complete the Tellico Dam would result in the loss of some \$53 million in nonrecoverable obligations Respondents dispute this figure, and point to a recent study by the General Accounting Office, which suggests that the figure could be considerably less. . . . The GAO study also concludes that TVA and Congress should explore alternatives to impoundment of the reservoir, such as the creation of a regional development program based on a free-flowing river. None of these considerations are relevant to our decision, however; they are properly addressed to the Executive and Congress.⁹⁹

Perhaps, then, the Chief Justice remained greatly concerned with the amount of federal funds expended but was convinced this issue was more appropriately addressed to the legislative or executive branch.

As with the retroactivity issue, the Chief Justice's comments at the hearing concerning the effect of continued congressional appropriations do not seem reconcilable with the portions of his opinion addressing that issue.

ATTORNEY GENERAL BELL: In the 1977 appropriations act, they actually appropriated \$2 million to transplant the snail darter. That was—I view that as a consultation by Congress. Not only by the agency, the Congress got into it and tried to resolve the problem.

CHIEF JUSTICE BURGER: Well, three times this project and the snail darter problem has been called to the attention of the Congress, has it not?

ATTORNEY GENERAL BELL: It has been everytime they said, go forward.¹⁰⁰

Once again, on the question of appropriations:

JUSTICE BRENNAN: If it came to the President to veto, what would he veto, the committee report or the statute?

ATTORNEY GENERAL BELL: He'd veto the statute.

And he couldn't—

98. *Id.* at 2291-92 (footnote omitted).

99. *Id.* at 2291-92 n.19.

100. Record at 19-20.

CHIEF JUSTICE BURGER: He could veto the appropriations, could he not, and stop the project, anytime since 1975?

ATTORNEY GENERAL BELL: Right. He has not done that. He has put it in the 1978 budget.¹⁰¹

These comments hardly seem in accord with the majority opinion's handling of the issue. Consider these excerpts:

There is nothing in the appropriations measure, as passed, which state that the Tellico Project was to be completed irrespective of the requirements of the Endangered Species Act. These appropriations, in fact, represented relatively minor components of the lump sum amounts for the *entire* TVA budget. To find a repeal of the Endangered Species Act under these circumstances would surely do violence to the "cardinal rule . . . that repeals by implication are not favored."

. . . [T]he policy applies with even *greater* force when the claimed repeal rests solely on an appropriations act. We recognize that both substantive enactments and appropriations measures are "acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.¹⁰²

The Chief Justice continues:

Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress, particularly not in the circumstances presented by this case. First, the appropriations committees had no jurisdiction over the subject of endangered species, much less did they conduct the type of extensive hearings which preceded passage of the earlier endangered species acts, especially the 1973 Act. We venture to suggest that the House Committee on Merchant Marine and Fisheries and the Senate Committee on Commerce would be somewhat surprised to learn that their careful work on the substantive legislation had been undone by the simple—and

101. *Id.* at 27.

102. 98 S. Ct. at 2299-300 (footnote omitted).

brief—insertion of some inconsistent language in appropriations committees' reports.

Second, there is no indication that Congress as a whole was aware of TVA's position, although the appropriations committees apparently agreed with petitioner's view.¹⁰³

The juxtaposition of these quite divergent treatments of the appropriations issue poignantly manifests the unpredictability of Chief Justice Burger's position.

The Chief Justice's apparent view during oral argument, later expressed by Justice Rehnquist's dissent, that the traditional equitable powers of the trial court permit the judge to balance such factors as benefits, costs, stage of completion, and the like, is equally perplexing. His remarks to Plater suggest strong support for T.V.A.'s position, but his opinion indicates otherwise.

CHIEF JUSTICE BURGER: Well, let me put another question to you that I think is in addition to that. You haven't discussed it yet, and you don't have much time left.

Do you suggest that any of the legislation passed here has abrogated the normal equity function of a United States District Judge in granting an injunction, the very extraordinary relief that is sought here—

MR. PLATER: Not at all, Your Honor.

CHIEF JUSTICE BURGER: —that—are you suggesting that he should not function as he does with any other application for an injunction?

MR. PLATER: Your Honor, that question is an important one. We do not advocate the stripping of this Court or any court of the equitable powers. And indeed, Your Honor, we rely on Your Honors' decision in *Rondeau v. Mosinee Paper Corporation*, and that is to say, the equity courts have the full panoply of powers required to enforce the laws of Congress.

JUSTICE REHNQUIST: But *Hecht* against *Bowles* says you don't get an injunction automatically for a statutory violation.

MR. PLATER: That's correct, Your Honor. And we do not insist on an injunction. If petitioner agreed to obey the law voluntarily, as the *Hecht* Corporation did in that case, or as the *Mosinee Paper Corporation* agreed in Your Honor's case—

CHIEF JUSTICE BURGER: Then you don't need an injunction?

MR. PLATER: That's precisely right.

CHIEF JUSTICE BURGER: It's academic.

MR. PLATER: And the law would be complied with.

CHIEF JUSTICE BURGER: But this question that I'm putting to you

is, should not the District Court, confronted with an application to enjoin the operation of a dam in which \$122 million worth of money, one way or the other has been invested—

MR. PLATER: 110, Your Honor.

CHIEF JUSTICE BURGER: 110? All right. \$110 million has been invested—exercise the ordinary functions of an equity judge weighing and balancing the equities.

MR. PLATER: Let me—yes, Your Honor, it seems to me that the Court does have equitable discretion. Let me describe, however—

CHIEF JUSTICE BURGER: And that includes the equitable discretion not to enforce the statute?

MR. PLATER: No, Your Honor, it does not.

CHIEF JUSTICE BURGER: You think it does not.¹⁰⁴

Consider now the Chief Justice's statements dealing with the equitable powers issue and the separation of powers doctrine, which constitute the conclusion of his opinion:

It is correct, of course, that a federal judge sitting as a chancellor is not mechanically obligated to grant an injunction for every violation of law. . . .

But these principles take a court only so far. Our system of government is, after all, a tripartite one, with each Branch having certain defined functions delegated to it by the Constitution. . . . Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.

Here we are urged to view the Endangered Species Act "reasonably," and hence shape a remedy "that accords with some modicum of commonsense and the public weal." . . . But is that our function? We have no expert knowledge on the subject of endangered species, much less do we have a mandate from the people to strike a balance of equities on the side of the Tellico Dam. Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as "institutionalized caution."

Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute. Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. We do not sit

104. Record at 51-52.

as a committee of review, nor are we vested with the power to veto. . . .

We agree with the Court of Appeals that in our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt congressional action by judicially decreeing what accords with "commonsense and the public weal." Our Constitution vests such responsibilities in the political Branches.¹⁰⁵

In addition to the paradox presented by Chief Justice Burger's unpredictable treatment of the issues of retroactivity, congressional appropriations, and equity power, several of his other remarks during the argument appear to unmask a preference for defendant's position and a hostility toward plaintiffs' argument. Thus, the Chief Justice seems to give great weight to the Attorney General's opinion and little to that of the Secretary of Interior.

CHIEF JUSTICE BURGER: Mr. Attorney General, did you have any obligation to present the views of the Secretary of the Interior, or was that merely a matter of comity as one Cabinet officer to another?

ATTORNEY GENERAL BELL: Well, it was more than that. It was a request.

CHIEF JUSTICE BURGER: Request by whom?

ATTORNEY GENERAL BELL: By the Secretary.

CHIEF JUSTICE BURGER: But has it not been historically true that the United States Government in this Court, and in all Federal courts, speaks through only one voice, namely, through the Attorney General of the United States?

ATTORNEY GENERAL BELL: That's what it ought to be.

CHIEF JUSTICE BURGER: Historically, that's been the case?

ATTORNEY GENERAL BELL: That is, and that's historically been the case with me, except in this one instance.¹⁰⁶

Then, after Justice Marshall asks whether further data is needed concerning T.V.A.'s transplantation efforts, and Plater replies that transplantation would in any event not fulfill the requirements of the Act, the Chief Justice explodes:

CHIEF JUSTICE BURGER: Do you mean that even if a successful transplant took place, you'd still be opposing the functioning of this dam?

MR. PLATER: Not at all, Your Honor, but we would request that legal procedures be followed. If the transplantation were a success so that the species were no longer endangered, the Secretary

105. 98 S. Ct. at 2301-02.

106. Record at 31.

of Interior, petitioned by TVA, would review the biological data for this Court and for Congress; would certify that it is no longer endangered; and would take it off the list; and that would be the end of the case.

CHIEF JUSTICE BURGER: Or else he could simply say that this is no longer its critical habitat.

MR. PLATER: Your Honor, under the Act, I believe that both of the elements are separate violations. That is to say, it is illegal for an agency either to render a species extinct, or to destroy its critical habitat.

CHIEF JUSTICE BURGER: Or to modify its critical habitat.

But if this—this could continue to be an endangered species, but if the area flooded by the dam is no longer its critical habitat, there would be no violation of the statute.

MR. PLATER: Unless—

CHIEF JUSTICE BURGER: If the fish thrive in the Hiwassee River.

MR. PLATER: Your Honor, if the fish thrive in the Hiwassee River, then indeed, as Mr. Chief Justice Burger suggested, through this procedure, this case would come to an end.

But that does not appear to be the biological evidence. As a matter of fact, it appears that the best place for a species to live is in its only known natural habitat.

I would indicate to the Court.

CHIEF JUSTICE BURGER: Well, that's not historically true for every species.

MR. PLATER: Well—

CHIEF JUSTICE BURGER: There have been all sorts of species transplanted into new areas where they did much better than they ever did in their original homes.

Isn't that the history of evolution?

MR. PLATER: Your Honor, however, apparently the Hiwassee River is connected geographically to the Little Tennessee. And biologists tell us that if the Hiwassee were a good habitat for the species, it would be there, by the process of evolution; but that rather, this species turns out to be a highly sensitive indicator of precisely the qualities of the habitat that the citizens were fighting about in this case for years before the snail darter was known to exist.¹⁰⁷

This interchange is scarcely predictive of the language of Chief Justice Burger's opinion, which, for the most part, agreed with all of plaintiffs' arguments.

Chief Justice Burger's judicial behavior in the case remains a conundrum. Among the nine Justices, he was clearly the most openly hostile to plaintiffs' arguments and, in a sense, personally

107. *Id.* at 41-43.

toward Plater. His remarks consistently favored T.V.A.'s position and opposed the Department of Interior and plaintiffs' point of view. Yet he authored the majority opinion adopting plaintiffs' points, and in so doing employed language clearly at odds with the attitudes he appeared to reveal during oral argument.

One can speculate that when the Chief Justice realized that a majority of the Court was likely to favor affirming the Sixth Circuit's decision ordering that an injunction issue, he decided to join the majority, rather than Justices Powell or Rehnquist, so that the preference for a "legislative remand" was quite clear. That is, he might have reasoned that another Justice favoring plaintiffs' position would, as author of the majority opinion, focus solely upon the strict statutory construction argument and not point out sufficiently that the decision was, in effect, opening the door to congressional or executive action exempting the Tellico Project from the Act's application or removing the snail darter's endangered status.¹⁰⁸ Although reconstruction of the Court's precise thought processes is, of course, impossible, this notion, if entertained by the Chief Justice, appears to be incorrect. Indeed, plaintiffs' argument was always premised upon the belief that a full public hearing on the project's cost and benefits was desirable. Plaintiffs' position never differed from the view that where a federal statutory violation exists, an injunction is the appropriate remedy, and if weighing of public policy considerations mandates an exemption, that is a legislative, not a judicial, function.¹⁰⁹ That another Justice—perhaps Justice Stevens or Justice Stewart—might draft the majority opinion and not adequately

108. Columnist Jack Anderson has suggested a similar hypothesis to explain the discrepancy between Chief Justice Burger's comments at oral argument and in private strongly favoring former President Richard Nixon's position in the White House Tapes case, *United States v. Nixon*, 418 U.S. 683 (1974), and his later authorship of the unanimous opinion compelling Nixon to submit the tapes to the trial court. After noting that the Chief Justice in private castigated the press for its Watergate coverage and generally seemed very antagonistic toward newsmen, Anderson notes:

It may seem ironic, therefore, that Burger wrote the 8-0 ruling that compelled Nixon to submit to the trial courts his incriminating secret White House tapes. But behind the scenes, the chief justice raised pro-Nixon arguments in the Supreme Court chamber. Even from the bench, he made observations and asked questions that were sympathetic to Nixon.

Our sources suggest that Burger probably decided that he could help Nixon more by writing a restrained majority opinion than standing alone in Nixon's corner. Burger took pains in the decision to give Nixon credit for good faith, even though the former president clearly sought to withhold the tapes to protect himself from public disgrace and criminal charges.

Anderson, *Burger Bares Anti-Press Bias*, Tacoma News Tribune, Oct. 10, 1978, at A-12.

109. Brief For Respondents at 58-59, *T.V.A. v. Hill*, 98 S. Ct. 2279 (1978).

rely upon this legislative remand argument seems unlikely. It was at the heart of plaintiffs' case.

DISCUSSION AND CONCLUSION

What conclusions can be drawn based upon the lengthy recounting of the Justices' questions and comments and analysis of them in light of the positions eventually adopted? The investigation does seem to confirm a few common sense impressions concerning judicial decision-making and predictability of opinions, regardless of the level of the court involved. For instance, it is obviously advisable to learn so much as possible about the predispositions of the members of the bench prior to oral argument and, in fact, before preparing final drafts of briefs. Thus, Justices Stevens and Stewart might easily have been predicted to adhere to a strict interpretation of the statute in reaching their decisions and Justice White predicted to favor nonintervention by the Court.

Perhaps as important, it becomes apparent that some impressions litigants have at the time of argument may be incorrect. Concentration upon trends in questioning is extremely important. Thus, Justice White's inquiries are few in number, spread throughout the hearing, and characterized by few lengthy discourses. Examination of the transcript, however, reveals him as potentially somewhat favorable toward a compromise resulting in the affirmance of the Court of Appeals' decision. On the other hand, Justice Blackmun, visualized by the author at the hearing to be reasonably balanced in his attitude and, therefore, an enigma as to final position, appears solidly disposed toward T.V.A.'s views. An ability to synthesize perceived trends in judicial remarks can clearly provide a relatively clear indication of court members' receptivity to various arguments and possible compromises.

Why is it important to be able to recognize the attitudes of the bench during oral argument? At the post-litigation level, it is, of course, intellectually challenging to conjecture what a court and the various justices will adopt as their final positions, though no attorney should advise a client to embark upon a course of action based upon prediction of result. During the appellate argument itself, a great deal can be achieved through recognition of the developing attitudes of the members of the court. Analysis of this transcript has, for example, shown that some Justices play quite specific roles as protagonists or antagonists. Identification of these roles permits the advocate to utilize them to their fullest extent. The advocate may be able to tailor the argument toward

certain theories and compromises that reveal themselves as being favorably viewed or at least acceptable. On the other hand, one should not pay less attention to a justice merely because he or she appears hostile or opposed to one's position. While Justice Powell cast his vote with T.V.A. from the very beginning, to write off Justices Marshall and Burger might have been a disastrous error. At the bottom line, an advocate should always attempt to answer inquiries as directly as possible regardless of source.

From a nonlitigation point of view, analysis of an appellate argument record in light of judicial positions ultimately taken provides a fascinating opportunity to speculate upon the intricacies of judicial decision-making. The author does not adhere to the belief expressed by some that, because eventual positions have already been adopted, the questions asked at oral argument are totally nonpredictive. Indeed, one can argue that precisely because some positions may have previously been developed, remarks made ought to be highly predictive. Thus, in *T. V.A. v. Hill*, examination of the record indicates the positions of Justices Stevens, Stewart, and Brennan in favor of affirmance were quite predictable from their oral argument remarks. So also were the contrary positions of Justices Powell and Rehnquist. Justices Blackmun's and White's views were less foreseeable, though careful re-examination and speculation evidence with reasonable clarity Justice Blackmun's support of T.V.A. and, to a somewhat lesser extent, Justice White's willingness to compromise and join the majority. Justice Marshall's judicial behavior remains perplexing, though a process of compromise similar to Justice White's can be hypothesized. Chief Justice Burger is the sole member of the Court the author found totally unpredictable.

It is somewhat artificial and perhaps misleading to speculate in hindsight about a judicial decision. Analysis of the transcript in *T. V.A. v. Hill*, however, does reveal the two-thirds of the Court composed of Justices Stevens, Stewart, Brennan, Powell, Rehnquist, and Blackmun as reasonably predictable. This prediction, nevertheless, still leaves the controversy unresolved at three votes for each side. If one speculates that Justices White and Marshall, both favoring a remand to the trial court, are less likely to join the dissenters than the majority, because to do the latter will merely preserve the status quo, then a majority of five members is constituted. This prediction, of course, could not have been made with a very high degree of certainty at the time of argument, particularly since the formal record was not yet

available.¹¹⁰ Once again, however, one is left with the dilemma of the Chief Justice, whose inquiries and comments do not seem at all consistent with his ultimate position.

Perhaps the most one can conclude is what many advocates already believe and what even most law persons would suspect—that, during oral argument, questions and comments by members of the court, at least the present United States Supreme Court Justices, are highly predictive of some of their judicial opinions, less so for others, not at all for some, and occasionally totally misleading. Although this conclusion may reveal little not already surmised, it at least confirms in a pseudoempirical manner, and hopefully an interesting manner, what many persons previously supposed to be true.

110. During the hearing, the author did take hurried notes of the questions asked by the Justices, but their necessarily abbreviated nature made them an inadequate substitute for the actual record of the proceedings.